SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1909.

~~431~~ 432

Nos. ~~784~~ and ~~785~~.

PERCY H. BRUNDAGE, *Appellant,* *against* BROADWAY REALTY COMPANY, et al.	No. 784.
PAUL LACROIX, *Appellant,* *against* MOTOR TAXIMETER COMPANY, et al.	No. 785.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

Statement.

These two cases involve the sole point of the Constitutionality of the Federal Corporation Income Tax Law of 1909.

In both cases the suits are brought in equity by a stockholder to enjoin the making of the returns required by the statute, and the payment of the tax on the net corporate income, by the officers and directors of the companies. In each case answers were interposed admitting the allegations of the complaint that the officers and directors of the companies intended to comply in all re-

spects with the law, but denying its unconstitutionality, and thus raising the question of the validity of the law. The Circuit Court by rendering judgment on the pleadings in favor of the defendants formally sustained the constitutionality of the law.

In the Lacroix case (785) the sole business of the defendant company consists in the owning and renting of motor vehicles. It derives income from no other source than the rent on the said vehicles (Rec. fol. 4).

In the Brundage case (784) the sole business of the company and the purpose for which it is organized is the holding and managing of real estate. It owns an office building in the City of New York, and also certain securities. Its business consists in collecting the rents of such buildings and the income from said securities. It has no other business and its income consists wholly of the direct proceeds of such real estate and personal property.

Specification of Errors.

The complainant stockholder claims that the law is unconstitutional:

(1) as an unwarranted assumption of a power not possessed by Congress, and

(2) even if generally constitutional as to corporations engaged in ordinary business or occupations, as having no valid application to corporate income derived solely from the rent of real or personal property.

The soundness of these contentions is the sole question raised by the assignment of errors.

Introduction.

All constitutional questions are grave and important. To insist upon this is to comment upon the obvious, but there are degrees of importance, even in regard to such questions. Whether a matter enters into the domain of Interstate Commerce or falls within the scope of some other enumerated power of the Federal Government may

mean much to individuals or communities, but cannot fundamentally affect the general form of constitutional Federal Government under which our nation has lived since its beginning. Such cases involve merely the interpretation of certain clauses of the constitution and their application to a particular state of facts, but the decision cannot alter the great general lines laid down implicity or expressly in our constitution. In terms of logic the extension of our constitutional principles remains thereby unchanged; only their intention can be affected.

Another and rarer class, however, is far more important and far reaching in its effects because the very existence of the basic principles themselves is brought into question.

Such was the situation confronting John Marshall and his colleagues on the bench of this Court in the early years of the Nineteenth Century when the case of McCulloch *v.* Maryland was called for argument. A decision in favor of the State of Maryland would have involved the annihilation by judicial construction of the great plan of the fathers for a government based upon the real federal principle of an indissoluble union of indestructable States, with each Government in its respective orbit independent of the other, because the Constitution framed by the sovereign people back of both governments had ordained that neither government (State or Federal) should possess the power, under the guise of taxation or otherwise, of fettering or destroying the powers reserved to the other. Such a decision by this Court in that *cause célèbre* would have meant a long step backward to that other and older kind of Federalism which had so justly gone into bankruptcy and disrepute under the articles of confederation; a Federalism in name only, in fact a temporary alliance of sovereign States whose central agent was a governmental instrument with no independent existence save at the will of sovereign States whose autonomous powers were not counter-balanced by another Government equally indestructible.

History never exactly repeats itself,—but in the movement of civilization striking parallels occur. When the State of Maryland attempted to tax the Bank of the United States, the Federal Government was weak, the federal principle evolved after so many failures was viewed with suspicion, and the danger to the nation's life came from the spirit of particularism which was loath to recognize that common institutions, language and traditions had united the thirteen Colonies into a national entity. State rights then meant in final analysis a condition of feebly languishing political existence such as Germany endured for centuries, until under the heel of foreign domination the national idea prevailed over that of "State Rights."

The Judges of this Court, seconded by that greatest of the world's forensic figures, Daniel Webster, were at length able to foster and develop a national sentiment, which, finally emerging triumphant from the Civil War, permitted us to realize the ideas of the founders in an indestructible union of indestructible States.

The pendulum of the human movement then begins to swing the other way. The federal system is no longer threatened by the encroaching power of the States upon the Federal Government, but the latter begins to encroach upon the States, and one of the two necessarily co-existing factors in the indestructible union is again threatened;—to-day it is the autonomy of the States.

In the Slaughter House cases and the Civil Rights cases, this Court protected the rights of the States against the new nationalism, as in the older day it had saved the central government against the old particularism. Yet the centralizing movement continues, and the new or *pseudo-nationalism*, owing to economic causes and social pressure, is now striving by even greater centralization to effect social reforms deemed by many of its advocates of more importance than the retention of the old landmarks which distinguish our constitutional system. As the abolitionists preferred the destruction of the constitution to the continuance of slavery, so those who fear

the powers of corporate capital to-day advocate and sometimes enact alleged remedies dislocative of our constitutional limitations under the plea of curbing growing and aggressive wealth.

This popular sentiment has now culminated in the present Corporation Income Tax law, which enacted in times of piping peace and great prosperity has, as shown by its genesis, history, and very plain terms, the one purpose of placing the supervision of the main portion of the business activity of the nation in the hands of the Federal Government and of exercising a power of taxation which admittedly involves the possible destruction of functions, activities and privileges which are and always have been within the exclusive control of the State. That such was its primary object its sponsors have not hesitated to emphatically declare.

The consideration of the wisdom of such a course is not here involved.

The question is whether this law is compatible with the federal system as understood by the Framers and expounded by this Court from the very beginning of the Government. From the nature of this system is derived that initial limitation upon the power of taxation, concerning which Marshall said, "the security against abuse of this power, is found in the structure of the government itself." (Wheat., 428.)

The weight of a question is in nowise enhanced by length of argumentation and in the following brief the endeavor is made to set out in succinct fashion the principles which Counsel believe applicable in view of the decisions of this Court. Shortness of statement is frequently easier in regard to fundamental questions than in matters turning merely upon the doubtful interpretation of statutes or the analysis of a long line of cases upon technical questions.

Counsel intend this brief to be in fact as in name a "brief," and well known cases will not be quoted at tedious length.

Summary of Appellants' Contentions.

I.

The tax is imposed, and falls, upon the right or franchise granted by the State to be a corporation. It is a true corporation tax and was so intended.

II.

The tax is invalid because violative of the fundamental constitutional principle that neither State nor Federal Government may tax one of the instrumentalities, or powers, of the other, since such taxation involves the possibility of the destruction by one Government of those functions reserved exclusively to the other, and would thus be destructive of the federal principle.

III.

Even assuming *arguendo* the tax not to be invalid as falling upon a power reserved to the States, yet in this class of cases it is invalid as falling upon income derived from real and personal property, and as such is a direct tax not levied by apportionment, hence necessarily violating the specific Constitutional prohibition. (Art. 1, Sec. 8.)

IV.

The tax is violative of the "due process clause" in that it is in form only a tax, but in effect an attempt to regulate matters of exclusive State concern, and is further unlawfully discriminatory against one class of persons, viz. corporations.

POINTS.

I.

The tax is one upon the franchise or right to be a corporation granted by the State.

At the threshold comes the inquiry: Upon what does this tax fall? What is its incidence? The answer to this must be sought in the nature of the tax itself and not in the terminology by which Congress may have sought to classify it. Judicial decisions amply recognize that even legislative *fiat* cannot change *"la nature des choses"* and that neither the laws of human reason nor of economic classification can be defied, even by a Congressional majority (178 U. S., p. 41).

The Act of Congress itself attempts to classify the tax, and the terms of the law, as well as the expressions of the members who took part in the debates, show that it was hoped to dodge grave constitutional questions by classing the tax as an "excise on business or occupation."

The language of the law is

> "That every corporation, etc., organized under the laws of the United States or of any State or Territory of the United States, etc., *shall be subject to pay annually a special excise tax with respect to the carrying on, or doing business by such corporation, etc.*"

The Senatorial debates (Cong. Record, July 1 and 2, 1909) show that there was great divergence of view as to the validity of the tax, the advocates of its constitutionality resting upon the proposition that it was an excise tax on business similar to that sustained in the case of Spreckels *v.* McClain, 192 U. S., p. 397. An examination of the law itself and of the decisions of this Court amply demonstrates, however, that the tax is *on all corporate franchises* and thus easily to be dis-

tinguished from the excise on a particular business sustained in the Spreckels case.

The tax is not on corporations and individuals, *i. e.*, all persons, engaged in business (as was the case in the War Revenue Law, passed upon in the Spreckels case) *but on all corporations, whatever their business*, excepting some charitable corporations usually exempt from taxation on general grounds of public policy and humanity. It cannot be answered as to this that the tax *is only on business done by corporations*, because a corporation having no revenue from business is subject to the tax in as much as it strikes "the entire income *received by it from all sources during such year*, and in the case of foreign corporations, the income received from business transactions and *capital invested* within the United States, etc." Thus a reading of the statute shows the pharse "with respect to the carrying on or doing business," to be a mere attempt by means of a fictitious label to misclassify a general tax on all corporations as a business excise rather than as a franchise tax. "Neither the State Courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect." (Galveston, etc., Co. *v.* Texas, 210 U. S., p. 227.) The plain purpose of the statute is to tax every corporation in the United States. The few exceptions in favor of eleemosynary institutions are of no consequence save as emphasizing the intrinsically far reaching and comprehensive nature of the tax.

The history of the taxation of corporations establishes that the modern corporation tax is one wholly differing in its origin and nature from the excise tax on consumption or business, as found in English and American tax law.

The general Corporation tax is a very modern device. The first State to enact it was Pennsylvania in 1824. Since then it has been largely adopted by other States. To attempt to class this tax with the special excise on business is to ignore history.

Moverover the Congressional debates and contemporaneous history can leave no doubts on this point. A considerable agitation in favor of an income tax, the utterances of prominent leaders of public opinion, the declarations of party platforms had led to a belief that Congress would do something in the way of imposing a very general tax on income. The proceedings in Congress and out of it indicate that the question finally resolved itself into whether that body would pass another general income tax, thus again raising the questions decided in the Pollock case, or whether it would be contented with some substitute? This situation is graphically disclosed in the superlatively skillful speech of the junior Senator from New York (July 1, 1909), advocating the adoption of this law as a substitute for a general income tax upon the ground that the decision in the Pollock case would make the passage of an income tax of the same character seem an affront to the Supreme Court, and that furthermore no such course was necessary at the present day, as the great bulk of the business of the country was carried on by corporations, so that a tax upon corporate incomes would be almost as lucrative as and much more just than a general income tax-falling upon all persons.

As the learned Senator with a frankness not always found in legislative halls said:

> "Gentlemen may say that I am for the Corpora-
> "tion Tax to beat the Income Tax. I care not. I
> "am for the Corporation tax, because I think it is
> "better policy, better patriotism, higher wisdom than
> "the general income tax at this time and under these
> "circumstances. * * * The general income tax
> "provision includes, *first, substantially the same*
> "*tax upon the business of corporations which is in-*
> "*cluded in the measure recommended by the Presi-*
> "*dent.* * * * *The Corporation tax includes the*
> "*same tax upon Corporations without the individual*
> "*tax, etc.* * * * Mr. President, it has so hap-
> "pened that in the development of the business of

"the United States, the natural laws of trade have "been making the distinction for us, and they have "put the greater part of the accumulated wealth of "the country into the hands of Corporations, so that "when we tax them, we are imposing the tax upon "the accumulated income and relieving the earnings "of the men who are gaining a subsistence for their "old age and for their families after them."

To characterize the tax as an occupation or business excise is to pervert history. Such taxes are a special class common in England and the United States. (Dowell's History of Taxation, also Patten *v.* Brady, 184 U. S., p. 608; Nicol *v.* Ames, 173 U. S., 509; Thomas *v.* U. S., 192 U. S., 363; Chesebrough *v.* U. S., 192 U. S., p. 253).

A glance at Sec. 32 of the Income Tax Law of 1894 (See 157 U. S., footnote p. 437), amply proves the correctness of Senator Root's assertion that the new Corporation Income Tax is similar to the old general income tax which provides

Income Tax of 1894.	Corporation Income Tax of 1909.
That there shall be assessed, levied and collected, etc., a tax of two *per centum annually, on the net profit or income, etc., of all Banks, etc., and all other corporations, companies or associations, doing business for profit in the United States,* no matter how created or organized but not including partnerships.	That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, * * * *shall be subject to pay annually* a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company, * * * *equivalent* to *one per centum* upon the *entire net* income * * *.

The addition of the words "in respect to the doing or carrying on of business" could hardly have changed the nature of that tax, making constitutional what without this mystical formula was unconstitutional. Modern law no longer recognizes the sacrosanctity of stereotyped legal phrases. Such an idea lies buried in the domain of primitive law.

The law of 1894 just quoted was held unconstitutional as applicable to companies deriving revenue from real estate or personal property.

The present corporation tax, then, being similar to the tax on corporations under the Act of 1894, is in its nature an income tax rather than an excise on doing business. Treating the tax as a whole, however, it must fall either within the category of a franchise tax, or an income tax. It is not logically possible to escape the dilemma. There is no third class in which it may be placed. This Court has aptly characterised such a tax as "a tax upon its franchise based upon its income."

> Mercantile Bank *v.* New York, 121 U. S., 138, 160.

Whichever it may be held to be, it is void as regards the two corporations here whose sole income is derived from rents.

The nature of a franchise tax has been analyzed and the tax classified by the Court in numerous cases. Suffice it to refer to Home Ins. Co. *v.* New York, 134 U. S., p. 594. A tax by the State of New York, upon the "corporate franchise or business of the Company" was held not to be a tax upon United States bonds, owned by the Company, *but upon the right to be a corporation.*

> "The right or privilege to be a corporation, or to do business as such body is one generally deemed to be of great value to the corporations, or it would not be sought in such numbers as at present * * *. The granting of such right or privilege rests entirely in the discretion of the State, etc."

The same doctrine is found as settled law in the following cases, Society for Savings *v.* Coite, 6 Wall., 594; Provident Institution *v.* Mass., *Ibid,* 611.

The reason the tax is so classified, as so lucidly explained by Mr. Justice Field, is because the legal incidence of the tax is upon corporations as such and consequently upon corporate franchises. This conclusion seems inevitable. The object of the present law was not a specific business or even any general category of business enterprises, but admittedly corporations generally.

The circumstances of its genesis, the wishes of the administration that framed it, the outspoken declaration of its chief legislative advocates, the analogy of the clauses of the old income tax law bearing on corporations, and the repeated decisions of this Court concur in ineffaceably stamping this tax as belonging to the well recognized class denominated corporation or franchise taxes, To attempt to evade the consequences by assimilating it to another and inherently different kind of tax cannot be done without ignoring its plain language, the nature of the tax and the decisions of the Court.

II.

This tax upon the franchise of corporations created by the State is unconstitutional because it is a tax upon a power belonging exclusively to the States.

We have no wish to iterate and re-iterate the fundaments of our Constitutional Law. Foundation stones in our Constitutional edifice such as McCulloch *v.* Maryland, it would be a work of supererogation at this bar to do more than mention.

The following cases settle the principle that where the Federal Government has an exclusive right of control or regulation, that right cannot be taxed by a State. And the argument is based upon the nature of our dual government which protects the integrity of both central

and local government, one against the other. An unavoidable parity of reasoning makes the cases upholding the proposition that the State Government cannot tax any power or function reserved by the Constitution to the Federal Government equally applicable to the action of the latter in taxing any power constitutionally belonging to the former.

That the principle is reciprocal cannot be disputed.

The first class of cases referred to includes:

McCulloch *v.* Maryland, 4 Wheat., 315, 435.
Weston *v.* Charleston, 2 Peters, 449.
Osborn *v.* The Bank of the United States, 9 Wheat., 738.
Bank of Commerce *v.* New York, 2 Black, 620.
Banks *v.* The Mayor, 7 Wall., 16.
Moran *v.* New Orleans, 112 U. S., 69.
Harman *v.* Chicago, 147 U. S., 396.
California *v.* Central Pacific R. R., 127 U. S., 1.
Dobbins *v.* Erie County, 16 Pet., 434.

The exemption of patents from State taxation is held in

People *ex rel.* The Edison Electric Light Co. *v.* Campbell, 138 N. Y., 543.
Commonwealth *v.* Westinghouse, 151 Pa. St., 265.

The cases in which this Court has applied the same principle to the protection of the State Governments against the Federal Government are:

The Collector *v.* Day, 11 Wall., 113.
United States *v.* R. R. Co., 17 Wall., 322.
Mercantile Bank *v.* New York, 121 U. S., 138, 162.
Pollock *v.* Farmers' Loan & Trust Co., 157 U. S., 429.
Ambrosini *v.* United States, 187 U. S., 1.

Approved unanimously in

South Carolina *v.* United States, 199 U. S., 437, 449, 468.

See also as to other inherent limitations upon federal legislation:

United States *v.* Dewitt, 9 Wall., 41.
Keller *v.* United States, 213 U. S., 138.

Assuming then that the principle of immunity is reciprocal, does this principle apply to the taxation at the will of one government of a corporate entity created by the other? Evidently the exact case has not heretofore arisen as to a corporation chartered by a State and taxed by the Federal Government, else this precise question would already have been adjudicated and this argument become superfluous. But if the precise case has not arisen, its exact converse has, and if it be admitted, as it always has been, and still must be, that this principle of immunity is reciprocal, then indeed it must be conceded that this Court has adjudicated the very question here involved. California *v.* The Pacific Railroad Co., 127 U. S., 1, seems to have settled the invalidity of this very tax.

There are only two ways of avoiding this result, (1) a refusal to follow that case, (2) a declaration that the principle does not work both ways and that the powers exclusively within State jurisdiction no longer enjoy the same immunity from Federal attack, and consequent potential destruction, as do the Federal powers from State interference. A decision to this effect would repudiate our Federal system and is of course unthinkable

If a tax upon a Federal franchise is a tax upon the Federal power under which it is granted, by what possible subtlety can the advocates of the tax claim that a tax on a State franchise is not one on the power under which such franchise is granted. The most scholastic of metaphysicians might well find the burden heavy.

In the year 1883 the State of California imposed an assessment upon the property of the Central Pacific Railroad. Said assessment was "not made separately upon the *franchise,* roadway, road-bed, rails and rolling stock, or any properties of said railroad, but all of said property was blended together in making said assessment."

Two questions only arose on the record;—(1) whether the tax was in accord with the State Constitution which divided the State powers of taxation between the local and general authorities; (2) whether the franchise emanating from the United States was taxable. That was the real question involved and considered. Mr. Justice Bradley delivered the unanimous opinion of the Court, saying, 127 U. S., 35, 38, 40, 41:

> "The first question then, is whether the defendant in these cases had any franchises granted to them by the Government of the United States. Of this there can hardly be a doubt. * * * Thus without referring to the other franchises and privileges conferred upon this Company, the fundamental franchise was given by the Acts of 1862 and subsequent acts to construct a railroad from the Pacific Ocean across the State of California, etc, * * * This important grant, though in part collateral, was *independent of that made to the Company by the State of California.* * * *
>
> Assuming then that the Central Pacific Railroad Company has received the important franchise referred to by grant from the United States, the question arises whether they are legitimate subjects of taxation by the States. They were granted to the Company for national purposes and to subserve national ends. It seems clear that the State of California can neither take them away nor destroy nor abridge them, nor cripple them by onerous burdens, can it tax them? It may undoubtedly tax outside visible property of the Company situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States?

> In our judgment it cannot. * * * No persons can make themselves a body corporate and politic without legislative authority. *Corporate capacity is a franchise.* * * * Recollecting the fundamental principle, that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of the power of the Government that confers it. *To tax it, is not only derogatory to the dignity, but subversive of the powers of the Government and repugnant to the paramount sovereignty.*"

This Court then found that the Railroad Company received from the United States Government "important franchises connected with its railroad," and that the State authorities included in the tax the value of such franchise, which the Board was prohibited by the Constitution of the State and of the United States from so including, and the tax was accordingly adjudged void.

There is thus no room for cavil as to what the Court there decided or on what proposition it based its decision. Transpose the words State and United States in that case and the Corporation Income Tax will be seen to be unconstitutional, assuming as we must that the Court will protect the integrity of the Constitution whether the menace be from Federal or State legislation. This Court has recently so declared in emphatic tone.

In Ambrosini *v.* U. S., 187 U. S., p. 1, where the sole question involved was the taxability of the bonds required to be given by liquor dealers under the Illinois law in order to obtain their license to sell, the Court speaking through the Honorable Chief Justice said:

> "The general principle is that as the means and instrumentalities employed by the general Government to carry into operation the powers granted to it are exempt from taxation by the State,

so are those of the States exempt from taxation by the general Government. It rests on the law of self-preservation, for any Government, whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct Government, exists only at the will of the latter."

In 1905 this Court again said:

"The exemption of the State's property and its functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the State in all its efficiency."

South Carolina *v.* U. S., 199 U. S., 437, 456.

The power to grant charters is one of the oldest State powers. It antedates the Revolution. Taxation with its logically concomitant potential destruction of this power by the general Government would thus be an attack upon, and possible annihilation of, one of the greatest and oldest of State functions.

The tender solicitude with which this Court has cherished this inherent and unavoidable postulate of our public law is well shown in Moran *v.* New Orleans, 112 U. S., 69, where a state license tax upon a tow-boat running to Mexico imposed under a general State law taxing such vessels was held unconstitutional as interfering with the power over Interstate Commerce residing in the Federal Government.

EXAMINATION OF CASES CLAIMED TO LIMIT THE RECIPROCAL IMMUNITY PRINCIPLE IN ITS APPLICATION TO STATE POWERS.

The learned Counsel for the Government can sustain the validity of the tax on one ground only; that it is a tax on the business of the corporation and hence valid under the doctrine of Soule *v.* Pacific Insurance Co., 7 Wall., p. 433, reaffirmed in the Srpeckels case, which though made much of by the authors of this law

neither did nor purported to do more than reiterate an old and settled rule of federal taxation. That this is a corporation tax, not a business excise, has been shown.

The contention that such a tax is not contrary to the reciprocal immunity principle will probably be predicated upon two recent and important pronouncements of this Court. They are Knowlton *v.* Moore, 178 U. S., p. 41 ,and South Carolina *v.* United States, 199 U. S., 437. Neither of these case seems to us to modify the principle of reciprocal immunity. If they do so the Court must have acted unconsciously in upsetting the Constitution since in both cases the principle is restated and an intention to disregard, modify or limit it expressly disclaimed.

The Knowlton case is too recent and well known to require long discussion. The War Revenue law of 1898 taxing successions was attacked as unconstitutional on the ground (as stated by Hon. John G. Carlisle), that

> "the tax in question is an attempt under the guise of taxation to regulate and control a subject over which Congress has no power but which is within the exclusive jurisdiction of the States." (Appellant's Brief, p. 3.)

This Court, after showing that such form of federal taxation was an old one, almost contemporaneous with the Constitution, answered the contention that the tax was upon a State power as follows:

> "The limitation which would exclude from Congress the right to tax inheritances and legacies is made to depend upon the contention that as the power to regulate successions is lodged solely in the several States, therefore, Congress is without authority to tax the transmission or receipt of property by death. This proposition is supported by a reference to decisions holding that the several States cannot tax or otherwise impose burdens on the exclusive powers of the national Government or the instrumentality employed to carry such powers into execu-

tion, *and conversely that the same limitation rests upon the National Government in relation to the powers of the several States.*

But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of the property upon death. *The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt and not the right existing to regulate."*

The incidence of the tax was on the act of transmission or receipt of the property. Economically speaking, the tax was upon the property forming the *corpus* of the succession, but if it had been held that the tax was upon the property then the doctrine of the income tax cases would have invalidated it as a non-apportioned direct tax. Having been treated from the beginning as a particular kind of tax, the Court evidently viewed the incidence not as upon the property but as upon the act of transmission or receipt. But in the case at bar any logical analysis makes inevitable the conclusion that the incidence of the present tax can only be one of two things, (1) the franchise or (2) the income; but this Court has held the tax on a federal franchise to be a tax on the *power to regulate Interstate Commerce*, so the distinction between the Knowlton case and this one is made manifest. If a State tax upon a Federal franchise be a tax upon a Federal power then by inevitable parity of reasoning a Federal tax upon a State franchise is a tax upon a State power, since, as this Court has repeatedly held, the granting, of a corporate franchise is completely within the power of the State. (Horn Silver Mining Co. *v.* New York, 143 U. S., p. 305.)

The Knowlton case sustains our major proposition, merely holding it inapplicable to a kind of tax, which was traditionally an excise, on the receipt of an inheritance.

The South Carolina case stands upon the proposition that when a State embarks upon a private business venture, it is subject to those portions of the Federal Internal Revenue tax applicable to such business. An excise tax on the liquor business, being constitutional while the business is carried on by an individual, remains constitutional after the State has taken over such business. The principle of reciprocal immunity is expressly admitted in the opinion of the Court. The dissenting opinion written by the Justice who wrote the opinion of the Court in the Knowlton case proceeds upon the theory that the tax is in fact obnoxious to the governmental immunity rule because the business is carried on as one of the incidents of the State's admitted power to regulate the liquor business.

Thus the difference in the Court turned upon the question whether the State was performing what was essentially a public function in monopolizing the liquor business or merely running a private venture. The difference was not one of principle, but of classification between private and public business.

We confidently submit that no lawyer can ever claim that the State in granting corporate franchises is engaging in a private business.

Summing up on this head, we say that the tax being upon the corporate franchise or right to be a Corporation is invalid.

III.

The tax in so far as it is falls upon income derived from real or personal property is a direct tax and hence invalid at least as to all income so derived.

The records in these two cases show all of the income of these corporations to have been derived either from the rent of real estate or of personal property As this Court has decided in the Income Tax Cases that a tax on income so derived was a tax on the realty or personalty itself, it necessarily follows that if the tax

have income as its incidence, it is at least as to the class of corporations to which these appellants belong unconstitutional. The tax must, as shown, fall either on the franchise or the income. If upon the former, the income being a mere measure of the value of the franchise, then the whole tax law must be invalid as a tax on a power belonging to exclusive State domain, but if the tax is on the income, the ruling in the Pollock case automatically invalidates it as to companies deriving their income as these companies do.

Whether if the tax is invalid because direct in its application to income from particular sources, the invalidity affects the whole law may be doubtful. If the invalid and valid provisions of the law be so inextricably woven together as to form one whole scheme of taxation the whole law must fall. If, on the other hand, the Court deems that these corporations deriving income from realty and personalty may be exempted from the operation of the law without materially affecting the whole scheme, it might hold it good as to other corporations. This question is unnecessary to discuss here as in either event the tax would be void as to the appellant corporations; the larger question as to the effect of such a ruling on the whole law will doubtless be fully dicussed by others in these cases.

In the Pollock case the tax on corporations which was held void as to income from realty and personalty was admittedly an income tax. Can the nature of a tax on corporations be changed by repealing the tax as to individuals? If the clause of the old income tax law (§32) relating to the income of corporations had been enacted alone, would its nature have been other than or different from the tax actually assessed against the Farmers' Loan & Trust Company? The non-inclusion of individual incomes could scarcely have changed the incidence of the tax or indicated any other intention than to tax all corporations by striking their incomes. If it be argued that such a law is indicative that the object sought to be taxed is not incomes, but corporations, then the tax may be considered as a franchise tax; but one or the other

it must be; there can be no middle ground. The only difference between this tax and the old one lies in the fact that (1) the name is different and (2) the tax is solely applicable to corporations. The label is not in any way determinative of the tax and its restriction to one kind of persons is conclusive that the tax cannot be an excise on business since it would then be applicable regardless of the persons by whom the business was carried on. Its restriction to a class of persons indicates that the tax was on that class; as such it could be construed to fall either upon the right to belong to such a class (to be a corporation) or to be a tax upon the income generally from all sources, in which case it must be as to corporations a general income tax. In either event the result is the same as to these two corporations. The tax is unconstitutional, either because (1) it is on the franchise to be a corporation or (2) being an income tax on corporations it is invalid as being an unapportioned direct tax.

Even as a tax on franchises it is a tax on property, and hence direct. It is the settled law of this Court that a corporate franchise is personal property,

See

Gulf & Ship Island R. R. Co. *v.* Hewes, 183 U. S., p. 66.
Postal Tel. Co. *v.* Adams, 155 U. S., 696.
Atlantic & Pacific Tel. Co. *v.* Philadelphia, 190 U. S., at p. 160.

The distinguished feature of excise taxation is that it is primarily imposed upon voluntary acts and may be avoided by abstaining from such acts. But here the corporations upon which the tax is imposed are already in existence and are receiving income, and no abstention from activity on their part will avoid the tax. They can escape only by dissolution or corporate suicide. It is true that the inheritance tax was sustained as an excise, but this classification, as already shown, was based principally upon historical grounds. Moreover the inheritance tax was upon an event to take place in the future and not upon an already existing status.

IV.

The tax is violative of the fourth and fifth amendments in that it involves unreasonable searches and lacks in due process of law.

These phases will doubtless be fully argued in some of the other cases. Suffice it to call the attention of the Court to those clauses of the law requiring the filing of returns by corporations, which make evident the real intention of Congress to supervise matters within the exclusive cognizance of the State.

These clauses, in connection with the history of the act, indicate beyond peradventure the purpose of the law to be an encroachment upon the local governments by the central government, as a result of the clamor against corporations. Not revenue nor a general tax upon a special business, but an instrument with which to regulate from Washington the corporations formed under State law is the objective. To curb, regulate or emasculate corporate wealth may be wise or desirable. To do so at the expense of crippling the federal principle seems neither wise, desirable nor necessary. It is the first step that counts. (*C'est le premier pas qui coûte.*)

A corporation tax law supplemented by a federal incorporation law will be amply calculated to deprive the States of one of their great powers and to substitute for Marshall's and Webster's indestructible duality one centralized Government. It will not be a long step to reducing the real self-governing American Commonwealths to the condition of mere administrative divisions, such as a French "Department" or German "Circle." Will the Court care to sanction the initial step?

All of which is respectfully submitted this fourteenth day of March, 1910.

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